Supreme Court, U.S.
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No. 061062

IN THE

Supreme Court of the United States

ANGIE CARTER, D.B.A. FAIRVIEW VIDEO, MARY HALL, MAURICE KING, D.B.A. MOVIE STORE, WILLIAM HARRIS, D.B.A. MOVIE WORLD,
PETITIONERS

v.

MGA, INC., AND ALL HOLDING COMPANIES AND AFFILIATED ENTITIES D.B.A. MOVIE GALLERY, UNITED PARCEL SERVICE, INC., (UPS), SELECT MEDIA SERVICES, LLC, MILE HIGH MEDIA, INC., LFP, INC., DIGITAL SIN, INC., FRASERSIDE HOLDING, LTD,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule 8 of the Federal Rules of Civil Procedure apply to Complaints alleging harm from Racketeer Influenced and Corrupt Organizations (RICO) Act violations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 3

CONCLUSION 5

APPENDIX

Circuit Court Opinion 1a

District Court Memorandum Opinion 7a

Order Denying Rehearing 9a

TABLE OF AUTHORITIES

Page

CASES

CONLEY V. GIBSON, 355 U.S. 41 (1957) 2

CRAWFORD-EL V. BRITTON, 523 U.S. 574 (1998) 2

LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, 507 U.S. 163 (1993) 2, 4

SCHEUER V. RHODES, 416 U.S. 232 (1974) 4

SWIERKIEWICZ V. SOREMA, N.A., 534 U.S. 506 (2002) 2, 4, 5

WILLIAMS V. MOHAWK INDUSTRIES, 411 F.3D 1252 (11TH CIR. 2005) 4

STATUTES

28 U.S.C. 1954(1) 1

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the appendix at App. 1a. The opinion of the District Court granting the Defendants' Motions to Dismiss is unreported and is reproduced in the Appendix at App. 1b.

JURISDICTION

The Court of Appeals Judgment was entered on July 13, 2006. A timely Motion for Rehearing and Rehearing En Banc was denied on October 30, 2006. Appendix at App. 2. The jurisdiction of this Court is invoked under 28 U.S.C. 1954(1).

RELEVANT PROVISIONS INVOLVED

"Rule 8 of the Federal Rules of Civil Procedure provides that: A Pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, unless the Court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for Judgment for the relief the pleader seeks."

STATEMENT

Plaintiffs seek review of the ruling of the Eleventh Circuit Court of Appeals which held that Plaintiffs' Complaint "did not allege facts that would

show – or create a reasonable inference" – that the Defendants were guilty of conspiring to and in fact dealing in obscenity through the distribution of pornographic and obscene materials. The Court further ruled that Plaintiffs failed to allege facts that would support their averments that the Defendants agreed to violate a substantive provision of the RICO statute; and that Plaintiffs were not held to a higher standard of pleading than that required by Rule 8 since the District Court never said it applied a higher standard nor was such requested by the Defendants.

Petitioners seek review of the Eleventh Circuit Ruling because it is in obvious conflict with the plain reading of Rule 8 and because it conflicts with the ruling of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Crawford-El v. Britton*, 523 U.S. 574 (1998) and, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002).

The petition arises out of a Complaint for damages by several small retailers who compete with MGA, Inc. (Movie Gallery) in the video retail market. The Complaint alleges that the Plaintiffs are not able to effectively compete because Movie Gallery sells and rents obscene material at premium prices while taking a loss on non-obscene stock. This, they alleged, enabled Movie Gallery to enjoy an illegal advantage. Plaintiffs provided a sampling of the movie titles distributed by the Defendants and two dates on which the illegal RICO conduct had occurred. The titles alluded to, among other conduct, anal sex and multi-party vaginal and anal sex.

The Complaint was filed on August 4, 2005; all of the Defendants filed Motions to Dismiss under Rule 12(b)(6). On September 19, 2005, the District Court granted these initial Motions, and as to the remaining Defendants on October 25, 2005. Plaintiffs appealed on November 23, 2005. The Eleventh Circuit Court of Appeals upheld the District Court in its July 13, 2006 Ruling. Whereupon, the Plaintiffs asked for Rehearing En Banc and the same was denied October 30, 2006. All rulings by the Eleventh Circuit were unpublished.

REASONS FOR GRANTING OF THE PETITION

The decision is contrary to the plain language of Rule 8 and Rulings by this Court.

Entitled "General Rules of Pleading" Rule 8 of our Federal Rules of Civil Procedure requires only that a Complaint contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment. Subparagraph (e) therein states that "each averment of the pleading shall be simple, concise and direct." No technical forms of pleading or motions are required. It has been called the keystone of the system of procedure embodied in the Federal Rules by none other than Charles Alan Wright.

Plaintiffs adhere to of the view that a District Court must liberally construe the allegations of a Complaint, accept these allegations as true and draw all reasonable inferences in Plaintiff's favor. It is generally accepted that a District Court may not dismiss for failure to state a claim unless it concludes beyond doubt

that a Plaintiff can prove no set of facts to support his cl[illegible] thereby entitling him to relief. The Eleventh Circuit, however, appears to make an exception in RICO cases... sometimes. (See, *Williams v. Mohawk Industries*, 411 F.3d 1252 (11th Cir. 2005)).

But an examination of Rule 8 will produce no such exception. This is a creation from whole cloth. It is completely without statutory or legislative authority. The "heightened pleading requirement" this Circuit created is in direct opposition to *Leatherman*, *Crawford-El v. Britton*, 534 U.S. 506 (2002) and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) where this Court again made it clear that in the face of Rule 8(a), a Court is not free to graft onto the Law its own notions about how to beat back litigation it disfavors. This Court again showed Courts that other tools can be used to weed out meritless claims (Summary Judgment and Control of Discovery) but that the Federal Rules recognize a liberal system of "notice pleading." *Leatherman supra*, 163. *Leatherman* was a unanimous opinion written by Chief Justice Rehnquist. *Swierkiewicz* was also unanimous and authored by Justice Thomas.

Emphasizing the point here, in *Swierkiewicz*, supra, Justice Thomas, citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974) to-wit – "When a Federal Court reviews the sufficiency of a Complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Justice Thomas went on to say that the imposition of a heightened pleading standard conflicts

with Rule 8(a)(2) which provides that a Complaint only has to include a short plain statement of the claim showing that the pleader is entitled to relief.

Some would argue that because the Rulings by the Eleventh Circuit are unpublished and therefore only advisory, they have no broad impact. Plaintiffs would counter that to not reverse these rulings would effectively re-write the Federal Rules and adopt the very stance that Justice Thomas in *Swierkiewicz* said this Court declined to do. That is, that Rule 8 applies to all civil actions, with limited exceptions (Rule 9(b)) and that "this Court has declined to extend such exceptions to either contexts." *Swierkiewicz, supra*, 513.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,
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Attorney for Petitioners

Nos. 05-15402 & 05-16523
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANGIE CARTER, d.b.a. Fairview Video, MARY HALL, et al.,
Plaintiffs-Appellants,

Versus

MGA, INC., and all Holding Companies and Affiliated Entities d.b.a. Movie Gallery, UNITED PARCEL SERVICE, INC. (UPS), SELECT MEDIA SERVICES, LLC, et al.,
Defendants-Appellees.

July 13, 2006, Decided

July 13, 2006, Filed

NOTICE: NOT FOR PUBLICATION

DISPOSITION: AFFIRMED.

COUNSEL: For Angie Carter, Mary Hall, Maurice King, William Harris, Appellants (05-5402, 05-16523): Malcolm R. Newman, Attorney at Law, DOTHAN, AL.

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For Select Media Services, LLC, Appellee (05-5402, 05-16523): Robert K. Spotswood, LLC, BIRMINGHAM, AL.

For Mile High Media, Inc., Appellee (05-5402): Howard P. Walthall, Jr., Burr & Forman LLP, BIRMINGHAM AL.

For LFP, Inc., Appellee (05-5402): Daniel J. Burnick, Sirote & Permutt, BIRMINGHAM, AL.

For Digital Sin, Inc., Appellee (05-5402): Randall D. Quarles, Waller Lansden Dortch & Davis, LLC, BIRMINGHAM, AL.

For Fraserside Holding, LTD, Appellee (05-5402): Todd Andrew Fuson, Prindle Decker & Amaro, LLP, LONG BEACH, CA; John Thomas A. Malatesta, Maynard Cooper & Gale, PC, BIRMINGHAM, AL; Donald Randolph James, Jr., Baxley, Dilliard, Dauphin & McKnight, BIRMINGHAM, AL; Nowell Donald Berreth, Alston & Bird LLP, ATLANTA, GA; Rebecca Brown Crawford, Alston & Bird, LLP, ATLANTA, GA; Cari Katrice Dawson, Alston & Bird, LLP, ATLANTA, GA; Joseph W. Letzer, Burr & Forman, BIRMINGHAM, AL; R. Joseph Decker, Prindle, Decker & Amaro, LLP, LONG BEACH, CA; Michael Todd Sansbury, Spotswood, LLC, BIRMINGHAM, AL.

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JUDGES: Before EDMONDSON, Chief Judge, and DUBINA and HULL, Circuit Judges.

OPINION: PER CURIAM:

Plaintiffs Angie Carter, Mary Hall, Maurice King, and William Harris appeal the district court's dismissal under Rule 12(b)(6) of their civil RICO claim. No reversible error has been shown; we affirm.

We review de novo the district court's grant of the motion to dismiss under 12(b)(6), accepting the factual allegations in the complaint as true and construing them in the light most favorable to Plaintiffs. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

Plaintiffs are the owners of video rental stores in Alabama. Plaintiffs sell and rent only nonpornographic materials. Defendant Movie Gallery, successor in interest to M.G.A., Inc., sells and rents pornographic and nonpornographic materials. Defendants Mile High Media, Inc., LFP, Inc., Digital Sin, Inc., and Fraserside Holding produce pornographic movies. Defendant UPS transported in interstate commerce pornographic materials from these companies to Movie Gallery. Defendant Select Media sold pornographic magazines to Movie Gallery.

Plaintiffs allege that Defendants violated 18 U.S.C. 1962(c)-(d)[1] by conspiring to distribute and by actually distributing obscenity and by using the proceeds of that distribution to allow Movie Gallery to sell and to rent nonpornographic materials at a price less than Plaintiffs were able to sell and rent nonpornographic materials.

To state a claim for vi lation of section 1962(c), Plaintiffs must allege facts showing "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir. 1994) (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985). A pattern of racketeering activity is defined as two predicate acts committed within a ten-year period. *Green Leaf Nursery v. E.I. DuPont De Nemours Co.*, 341 F.3d 1292, 1306 (11th Cir. 2003). Plaintiffs alleged that Defendants violated two federal obscenity statutes, 18 U.S.C. §§ 1462 and 1465, on 27 September 2004 and 22 October 2004. Both violation of the statutes are identified as predicate acts in 18 U.S.C. 1961.[2]

Plaintiffs must allege facts sufficient to show a violation of these obscenity statutes to survive a motion to dismiss. See *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 949 (11th Cir. 1997) ("In order to survive a motion to dismiss, a plaintiff must allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts."). Plaintiffs, however, did not allege facts that would show -- or create a reasonable inference -- that the pertinent materials were obscene. The only facts Plaintiffs state about the pertinent materials are their titles. These titles create a reasonable inference that at least some of the materials

were pornographic but are insufficient to create a reasonable inference that the materials were obscene. Plaintiffs' statements that the materials are obscene are insufficient to survive a motion to dismiss. See *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal."). Therefore, the district court properly dismissed the section 1962(c) claim.

Section 1962(d) makes it illegal to conspire to violate a substantive RICO provision. To state a claim under this section, Plaintiffs must allege facts to support an agreement to violate a substantive provision of the RICO statute. *Jackson v. Bell South Telecomm.*, 372 F.3d 1250 (11th Cir. 2004). But Plaintiffs alleged no facts to show or to create a reasonable inference that Defendants made an agreement. Plaintiffs' conclusory allegations that Defendants conspired with each other are insufficient to survive a motion to dismiss. Therefore, the section 1962(d) claims were properly dismissed.

Plaintiffs argue that they were held to a higher standard of pleading than that required by Federal Rule of Civil Procedure 8. But the district court never said it applied a higher standard to RICO pleadings, and Defendants never argued that a higher standard should be used. As discussed above, Plaintiffs did not allege facts sufficient to support their claims and thus did not meet the requirements of Rule 8.

AFFIRMED.

Footnotes

n1 Plaintiffs did not actually state that Defendants violated section 1962(c) in the complaint, but instead that Defendants violated 1462(c). As the text of that paragraph seemed to indicate section 1962(c) was intended, we will address that claim.

n2 Plaintiffs also alleged that Defendants violated 18 U.S.C. § 1466, but this statute is not listed in 18 U.S.C. § 1961 as a possible predicate act.

11/21/2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANGIE CARTER, d/b/a FAIRVIEW VIDEO, et al.,
Plaintiffs,

v.

MGA, INC., d/b/a MOVIE
GALLERY, et al.,
Defendants.

CIVIL ACTION N0. 05-AR-1662-5
MEMORANDUM OPINION

At this court's regular motion docket on November 18, 2005, defendant, Fraserside Holding, Ltd. ("Fraserside"), withdrew its challenge to this court's jurisdiction and submitted on its motion to dismiss pursuant to Rule 12(b)(6), F . R. CIV. P. Plaintiffs did not respond to Fraserside's motion to set aside the entry of default. Both Fraserside's motion to set aside the entry of default, and its motion to dismiss are well taken, and will be granted for the reasons stated in the earlier orders granting other defendants' motions to dismiss, as well as those presented by Fraserside. This will render moot Fraserside's motion to strike the exhibits plaintiffs attached to what they call "Answer to Motion to Dismiss".

An appropriate separate order will be entered.

DONE this 21st day of November, 2005.

WILLIAM M. ACKER, JR.,
UNITED STATES DISTRICT JUDGE

10/30/06
Nos. 05-15402 & 05-16523
UNITED STATES COURT OF APPEALS
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ANGIE CARTER, d.b.a. Fairview Video, MARY HALL, et al.,
Plaintiffs-Appellants,

Versus

MGA, INC., and all Holding Companies and Affiliated Entities d.b.a. Movie Gallery, UNITED PARCEL SERVICE, INC. (UPS), SELECT MEDIA SERVICES, LLC, et al.,
Defendants-Appellees.

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.